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Nos. 02-530

IN THE

Supreme Court of the United States

GARY L. GUSTAFSON, *et al.*,

Petitioners,

v.

BRIDGESTONE/FIRESTONE, INC.,
BRIDGESTONE CORPORATION
AND FORD MOTOR COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioners are plaintiffs who brought a proposed nationwide class action involving purchasers of about 60 million different Firestone tires involved in a safety investigation conducted by the National Highway Traffic Safety Administration ("NHTSA"), arguing that they were entitled to compensation because the tires had some undefined "propensity" to fail. The district court granted nationwide class certification of plaintiffs' warranty, unjust enrichment, and consumer fraud claims, ruling that Tennessee law applied to all of these claims. The Seventh Circuit reversed the district court's choice-of-law ruling, found that the laws of 51 different jurisdictions would apply to the millions of claims at issue, and ruled that because the laws of different jurisdictions varied materially, class treatment would be unmanageable. Under these circumstances, did the Seventh Circuit err in reaching that conclusion?

2. The Seventh Circuit further ruled that the NHTSA administrative process was superior to class treatment of plaintiffs' claims. Plaintiffs' second, third, and fourth questions presented each distort this superiority holding. The core question is, did the Seventh Circuit err in ruling that class treatment was not superior where the case raised individualized legal and factual issues that would make it unmanageable as a class action, plaintiffs seek to pursue a novel "propensity-to-fail" theory that should be developed (if at all) through individual litigation, and the NHTSA administrative process had already provided relief to those members of the proposed class who owned the specific sizes and types of tires that NHTSA determined should be replaced through a product recall?

PARTIES TO THE PROCEEDINGS

Petitioners are 229 alleged individual purchasers or lessees of certain Ford Explorers or Firestone tires. *See* Pet. App. 82a-85a.

Respondents are (1) Bridgestone/Firestone North American Tire, L.L.C., as successor to Bridgestone/Firestone, Inc.; (2) Bridgestone Corporation; and (3) Ford Motor Company. Bridgestone/Firestone North American Tire, L.L.C. is wholly owned by its parent corporation, Bridgestone/Firestone Americas Holding, Inc., which in turn is wholly owned by its parent corporation, Bridgestone Corporation. Bridgestone Corporation has no parent corporation, and no publicly-held company owns ten percent or more of its stock. This brief is filed on behalf of Bridgestone/Firestone North American Tire, L.L.C. (as the successor to Bridgestone/Firestone, Inc.) and Bridgestone Corporation.

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INTRODUCTION

The petition provides no reason to grant review of the unanimous panel opinion of the Seventh Circuit reversing the district court's erroneous and unprecedented nationwide class certification decision. In attempting to justify review, plaintiffs misstate controlling law, misstate the Seventh Circuit's opinion, and misstate the facts of record.

No federal appellate court has ever approved certification of a litigation class as sprawling and unusual as the one certified by the district court here—a nationwide class of millions of "persons whose tires did *not* fail, whose vehicles did *not* roll over." Pet. App. 4a (emphasis in original). As the Seventh Circuit recognized, the district court improperly lumped together warranty, unjust enrichment, and consumer fraud claims relating to 60 million tires made to scores of different design specifications and sold nationwide over more than a decade. Plaintiffs cite no federal precedent that is even vaguely similar to this case. There is none.

The district court granted class certification based upon a misapplication of Indiana choice-of-law rules, under which all of these nationwide claims against Firestone would be governed by Tennessee law, and on a skewed factual predominance analysis that ignored significant portions of the record. The district court also ignored the reality that most of the tires at issue had been used without incident for many years and for thousands of miles. The district court thus breathed life into millions of "no-injury" claims that likely would have been barred by the laws of most states.

It is unsurprising that the Seventh Circuit reversed class certification: reversal is consistent with the mandates of Rule 23 and the settled law of this Court and circuit courts around the nation. There is no basis for review.

COUNTER-STATEMENT OF THE CASE

In May 2000, the National Highway Traffic Safety Administration ("NHTSA") began an investigation into certain ATX and Wilderness brand tires made by Bridgestone/Firestone, Inc.[1] That investigation was very broad, including about 60 million tires made in 41 different sizes and 53 different lines, to scores of different design specifications, at seven plants, over a decade.

On August 9, 2000, during the course of the NHTSA inquiry and with that agency's oversight, Firestone began a recall of about 14 million P235/75R15-sized ATX and Wilderness AT tires that had been sold, beginning in 1991, primarily to Ford Motor Company for use as original equipment on Explorer vehicles.[2] Although Firestone was unable to identify any defect in the recalled tires, a tiny fraction of them—fewer than 1%—had experienced tread separation failures.[3]

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[1] The entity that conducted the recall and was named as a defendant in this litigation is Bridgestone/Firestone, Inc. Due to a November 2001 restructuring, that entity has been succeeded by Bridgestone/Firestone North American Tire, L.L.C. For ease of reference, however, we refer to both as "Firestone" throughout this brief. Bridgestone Corporation, which was also named as a defendant in this lawsuit, joins in this opposition brief.

[2] Different tires are identified by brand or tire line and by alpha-numeric indicators that detail certain features of the tire. For example, "P235/75R15" conveys the following information: the "P" ordinarily indicates a passenger tire; "235" is the tire's section width (from sidewall to sidewall) in millimeters; "75" is the tire's aspect ratio (*i.e.*, the tire's section height expressed as a percentage of the tire's section width); "R" denotes a radial tire; and "15" is the rim diameter in inches.

[3] Under the Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*, a "determination of 'defect' may be based exclusively on the performance record of the vehicle or component" (*United States v. Gen. Motors Corp.*, 518 F.2d 420, 432 (D.C. Cir. 1975)), and NHTSA need only establish a "non-de minimus number of failures" to order a product recall (*id.* at 438 n.84). Thus, "[d]eterminations of fault or liability relevant to the award of

When Firestone announced the August 2000 recall, it estimated that about 6.5 million of these tires were still on the road—the others having been worn out and replaced after regular use. To expedite the recall, Firestone replaced recalled tires with new Firestone tires, and also reimbursed tire owners up to $100 per tire if they replaced recalled tires with competitive brands. By December 2000, the recall was essentially complete.

In October 2001, NHTSA determined that approximately 3.5 million Wilderness AT P235/75R15 and P255/70R16-sized tires that had been manufactured prior to May 1998 and used on sport utility vehicles should be recalled. Firestone estimated that about 768,000 of those tires might still be on the road; it agreed to replace those tires as well.[4] NHTSA subsequently closed its investigation as to all other tires. When all was said and done, less than a third of the tires in the NHTSA investigation were subject to recall.

In the wake of the August 2000 recall, numerous consumer class action complaints were filed in state and federal courts against Firestone, Bridgestone, and Ford Motor Company. The defendants removed many of the state-court actions and sought pretrial consolidation of all federal cases under 28 U.S.C. § 1407. Ultimately the cases were consolidated before Judge Sarah Evans Barker of the United States District Court for the Southern District of Indiana.

Thereafter, more than 200 plaintiffs filed a consolidated master class action complaint. These plaintiffs are a disparate group of individuals. They owned tires of different sizes and

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damages at common law" do not enter into the defect inquiry under the Safety Act. *Id.* at 434.

[4] In May 2001, Ford separately announced that it would provide free replacement of all Wilderness AT tires on Ford vehicles, regardless of whether those tires were subject to any NHTSA order or had been recalled by Firestone.

types that were used on different vehicles. They bought their vehicles or tires both new and used, at different times, and in different places. With three exceptions, none of them alleged any failure of any kind in any Firestone tire or any Ford Explorer. Rather, plaintiffs claimed generally that their Firestone tires have a "propensity to fail" from tread/belt separation. Relying on this novel theory, they sought damages and injunctive relief based on fraud and contract theories. Although plaintiffs focused their allegations upon alleged conduct relating to Ford Explorers and recalled P235/75R15 tires, they nevertheless sought to have the trial court certify a massive class of millions of consumers who owned, or had owned, any of the 60 million tires that NHTSA included in its investigation.

In July 2001, the district court granted in part and denied in part defendants' motion to dismiss. Rejecting the position that the law of each plaintiff's state of residence and/or purchase governed his or her claims, the court ruled as a matter of Indiana choice of law that Tennessee law would apply to all of plaintiffs' claims against Firestone and Michigan law to their claims against Ford. It then determined that plaintiffs failed to state valid claims for violations of RICO, negligence, or breach of redhibitory defects under Louisiana law, but could proceed on claims for breach of express and implied warranty, unjust enrichment, and consumer fraud.[5]

In December 2001, the district court certified three classes of owners of Firestone tires and Ford Explorers. In doing so, it rejected prior Seventh Circuit decisions instructing that nationwide purchaser classes alleging fraud and warranty theories raised manageability problems at odds with Rule 23(b)(3). Instead, the district court incorporated its ruling that Tennessee and Michigan law would govern claims against

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[5] In a ruling denying Bridgestone's separate motion to dismiss, the district court ruled that Tennessee law would apply to all claims against Bridgestone.

Firestone and Ford, respectively, and with minor exceptions, ruled that the proposed classes should be certified for all of the legal theories remaining in the case. Thus, after the August 9, 2000 recall was complete and after NHTSA's investigation was closed, the district court certified a massive class of owners of all 60 million Firestone tires that had been subject to the NHTSA inquiry.

Defendants sought review under Rule 23(f). In a unanimous panel decision written by Judge Frank Easterbrook, the Seventh Circuit reversed. The Seventh Circuit first ruled that the district court erred as a matter of Indiana law in its choice-of-law analysis. Under Indiana choice-of-law principles, the laws of all 50 states and the District of Columbia would apply to class members' claims. The Seventh Circuit then determined that the various jurisdictions' laws differed with respect to the elements of plaintiffs' claims. It thus concluded that "[b]ecause [plaintiffs'] claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable." Pet. App. 9a.

The Seventh Circuit also ruled that numerous factual differences among members of the class made class certification inappropriate. The tires included in the class "exhibit variability." *Id.* 10a. "[F]ewer than half of those included in the tire class were recalled," and "the six trade names listed in the class certification order comprise 67 master tire specifications: 'Firehawk ATX' tires, for example, come in multiple diameters, widths, and tread designs; their safety features and failure modes differ accordingly." *Id.* And, although plaintiffs claimed that all of the tires lacked certain design characteristics, "whether a particular feature is required for safe operation depends on *other* attributes of the tires, and as these other attributes varied across the 67 master specifications it would not be possible to make a once-and-for-all decision about whether all 60 million tires were defective, even if the law were uniform." *Id.* (emphasis in original). After noting that "there are other differences" in the factual

circumstances of class members, the court held that the factual differences "preclude[d] any finding 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.'" *Id.* (quoting Fed. R. Civ. P. 23(b)(3)).

Finally, the Seventh Circuit rejected the district court's "certify-at-all-costs" approach to class certification. To begin with, the court noted that, because the plaintiffs seek to pursue novel, no-injury claims, "most states would not entertain the sort of theory that plaintiffs press." Pet. App. 7a. Thus, in assessing whether this litigation satisfied the "superiority" requirement of Rule 23, the district court had misconceived its role: in an attempt to resolve all of the claims of these millions of tire and vehicle owners in a single proceeding, the district court had violated choice-of-law rules and proceeded in a manner that would not allow plaintiffs' claims to be addressed under the various states' laws. The Seventh Circuit recognized that what it labeled as a "decentralized" approach is necessary to permit a fair and efficient assessment of the value (if any) of these nationwide consumer claims. "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *Id.* 12a (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-73 (1996)).

Contrary to plaintiffs' assertions, the Seventh Circuit neither took issue with the judgment of state lawmakers nor derived a rule that plaintiffs' claims should not be adjudicated. Rather, the court assessed the manageability and superiority of a single proceeding in which the disparate claims of millions of tire owners located throughout the nation would be aggregated and adjudicated under the law of one state. The court determined that such a proceeding could not be squared with Indiana choice-of-law rules or the requirements of Rule 23. Following this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997), the Seventh Circuit held

that as "[t]empting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." Pet. App. 13a. Accordingly, on the facts presented here, "[r]egulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of *uninjured* buyers for dealing with consumer products that are said to be failure-prone." *Id.* 11a (emphasis in original).

Plaintiffs sought *en banc* review. On June 5, 2002, the full court denied their petition, with no judge voting for *en banc* consideration.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S CHOICE-OF-LAW RULING DOES NOT CONFLICT WITH THE LAW OF OTHER CIRCUITS

A. The Seventh Circuit Properly Determined That Because The Laws Of The Jurisdictions At Issue Would Vary Concerning Plaintiffs' Claims, Nation-wide Class Certification Would Be Unmanageable

Plaintiffs do not seek review of the Seventh Circuit's core state-law holding that, under a proper interpretation of Indiana choice-of-law rules, the laws of all 51 jurisdictions would apply to the diverse claims of millions of tire and Explorer owners around the nation.[6] Based upon the record before the Seventh Circuit, reversal of class certification correctly followed as a matter of course.

Even the district court had recognized that the laws of the different jurisdictions at issue vary materially with respect to plaintiffs' warranty, unjust enrichment, and consumer fraud

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[6] In any event, this Court generally does not review state law rulings. *See, e.g., The Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

claims. In a portion of its motion-to-dismiss ruling that was incorporated into its class certification decision, the district court recognized that "the relevant substantive laws of the different states involved are sufficiently different to require a choice of law analysis." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1078 (S.D. Ind. 2001). Plaintiffs' proposal to apply Tennessee law to all claims nationwide against Firestone, and the district court's willingness to accept it, show their basic recognition of the variability of state laws. Indeed, the district court recognized in its class certification ruling that applying Tennessee law nationwide was critical to finding that the case would be manageable, since that eliminated problems of "state law variation that plague the pursuit of class certification in many cases." Pet. App. 67a n.45.

Nevertheless, in addition to attempting to justify the district court's choice-of-law ruling, plaintiffs also argued to the Seventh Circuit that the laws relating to their claims were uniform nationwide. Plaintiffs referred to charts purporting to show similarities among state laws, but those charts in fact illustrated that the law *differs*. Defendants also submitted 33 additional pages of charts showing that plaintiffs significantly understated material variations among the laws of different jurisdictions.[7]

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[7] Plaintiffs did not submit defendants' state-law charts to this Court with their petition. But even according to plaintiffs' own charts, for example, some states model their consumer fraud laws after the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1); others incorporate provisions adopted by the Commission on Uniform State Laws; others use provisions from both sources; still others enumerate their own deceptive acts and practices. Pet. App. 139a-156a. Some states, like Colorado, Kansas, South Dakota, Utah, and Wisconsin, require scienter but not individual reliance. *Id.* 142a, 145a, 154a, 155a. Others, like Georgia, Indiana, Texas, Vermont, and Wyoming, require individual reliance but *not* scienter (*id.* 143a, 145a, 154a, 155a, 156a), while in the District of Columbia, the scienter standard is unknown (*id.* 143a). And Iowa's consumer protection statute does not permit private claims at all (*id.* 145a).

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The Seventh Circuit rejected plaintiffs' argument that the laws were substantially similar. Pet. App. 3a ("state laws about theories such as those presented by our plaintiffs differ"); *id.* 7a ("most states would not entertain the sort of theory that plaintiffs press"); *id.* ("[s]tate consumer-protection laws vary considerably, and courts must respect these differences"). Thus, the Seventh Circuit concluded that nationwide class treatment would be unmanageable. Citing four of its own prior decisions, the Seventh Circuit explained that, "such differences [in relevant state laws] have led us to hold that other warranty, fraud, or products-liability suits may not proceed as nationwide classes." *Id.* 3a.

The Seventh Circuit certainly did not view this conclusion as a close call, and it was not. As shown below, the ruling is soundly within the body of federal decisions finding that differences in state laws generally preclude nationwide class certification of such claims. In short, the Seventh Circuit's decision was not only correct, but also in the mainstream of contemporary Rule 23 jurisprudence.

B. The "Conflicts" Cited By Plaintiffs Are Illusory

Plaintiffs' assertion that the Seventh Circuit's ruling conflicts with the decisions of other courts of appeals is wrong.

Plaintiffs' charts show that state unjust enrichment laws also incorporate divergent elements—ranging from proof of fraud, to failure of consideration, to a showing that defendant's conduct was "morally wrong." Pet. App. 91a n.7; 92a n.17; 94a n.33; 95a n.45. The charts also show that states vary in their formulation of express warranty law: at least ten states require proof of plaintiff's reliance on the express warranty, while seventeen have not yet addressed the question. *Id.* 107a-109a. With respect to implied warranty, the charts reveal that states are split on whether the buyer and seller must be in privity: 18 states require privity, 32 do not. *Id.* 114a-115a. Louisiana, which has not adopted the UCC, does not recognize breach of implied warranty claims. *Id.* 123a.

Plaintiffs latch onto a single sentence in the Seventh Circuit's opinion: "[n]o class action is proper unless all litigants are governed by the same legal rules." Pet. 14. Plaintiffs contend that the Seventh Circuit announced an inflexible rule that unless the unitary law of a single jurisdiction applies, class treatment is unavailable. But that is neither the essence of the Seventh Circuit's holding nor essential to its conclusion that *this* case would be unmanageable under the divergent laws of 51 different jurisdictions. The Seventh Circuit was essentially reiterating the longstanding view of federal courts that a proposed litigation class will be unmanageable unless there is substantial similarity among the laws applicable to all of the claims at issue. If the laws implicated diverge materially, "the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a) [and] (b)(3)." Pet. App. 3a. The Seventh Circuit's holding does not conflict with any of the decisions cited by plaintiffs.

Fifth Circuit. Contrary to plaintiffs' argument (Pet. 16), the Fifth Circuit's decision in *Castano v. American Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996), is entirely consistent with the Seventh Circuit's ruling. In the first place, the Fifth Circuit decertified the class action and dismissed the class allegations, relying in part upon differences in state law. *See id.* at 742-44, 752. Second, the *Castano* court did not remand to the district court for "the opportunity to conduct" a choice-of-law analysis, as plaintiffs contend the Seventh Circuit should have done here. Pet. 16. Instead, the *Castano* court assessed how "variations in state law affect predominance and superiority" (84 F.3d at 741), and based upon that review (*id.* at 741-44 & nn.15, 16), determined that the trial court's class certification order should be reversed (*id.* at 749-50). The Seventh Circuit approached this case in the same way. There is no conflict.

DC Circuit. Nor does the Seventh Circuit's approach conflict with the DC Circuit's decision in *Walsh v. Ford*

Motor Co., 807 F.2d 1000 (D.C. Cir. 1986). *Cf.* Pet. 17. The *Walsh* court, like the Seventh Circuit here, *reversed* class certification based in part upon choice-of-law problems. The DC Circuit chose to remand to the district court for an analysis of whether variations in state law "present insuperable obstacles" to class treatment under Rule 23(b)(3), rather than performing that analysis itself. 807 F.2d at 1016-17. But the DC Circuit did not purport to hold that an appellate court *cannot* perform that analysis; nor did the DC Circuit suggest that an appellate court should ignore numerous prior decisions consistent with its current ruling.[8] Here, the Seventh Circuit, relying on its own recent decisions, chose to perform the evaluation and decertify the class.

Ninth Circuit. Plaintiffs also err in contending (Pet. 16) that the Seventh Circuit's approach conflicts with the Ninth Circuit's decision in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998). Because *Hanlon* was a *settlement* certification, that court did not have to evaluate whether choice-of-law problems would be insuperable at trial. *See, e.g., In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 225 (E.D. La. 1998) (distinguishing *Hanlon* as settlement certification decision).[9] But even on its own terms, *Hanlon* does not establish any conflict warranting *certiorari* review. The *Hanlon* court stated that state-law variations "do not necessarily preclude" Rule 23(b)(3) certification, but noted that plaintiffs must "be prepared to demonstrate the

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[8] On remand, the district court in *Walsh* ruled that differences in relevant state warranty laws made class treatment impossible. *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 271-76 (D.D.C. 1990).

[9] By contrast, in a subsequent *litigation* class decision, the Ninth Circuit recognized that, "'[w]here the applicable law derives from the law of the 50 states, as opposed to a unitary federal cause of action, differences in state law will 'compound the [] disparities' among class members from the different states.'" *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir.), *as amended*, 273 F.3d 1266 (9th Cir. 2001) (citations omitted).

commonality of substantive law applicable to all class members." *Hanlon*, 150 F.3d at 1022. That approach is not at odds with the Seventh Circuit's decision below: the Seventh Circuit assessed the relevant law and determined that there is no commonality with respect to the applicable consumer fraud and contract laws at issue here; it then reversed nationwide class certification.

Third Circuit. Finally, plaintiffs contend that the Third Circuit permits plaintiffs to proceed with nationwide class certification under Rule 23(b)(3) when plaintiffs have made a "creditable showing" that the laws can be grouped into manageable patterns. Pet. 15. They cite *In re School Asbestos Litigation*, 789 F.2d 996, 1010 (3d Cir. 1986), *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *In re Prudential Insurance Co. of America Sales Practices Litigation*, 148 F.3d 283 (3d Cir. 1998). The Seventh Circuit ruling here conflicts with none of these decisions.

The Seventh Circuit's ruling is completely consistent with *School Asbestos*. Plaintiffs here failed to show that the specific no-injury claims at issue could be separated into manageable subsets, let alone make a "creditable showing . . . that class certification does not present insuperable obstacles." *School Asbestos*, 789 F.2d at 1010. The Seventh Circuit rejected plaintiffs' argument that the laws relating to these claims are substantially uniform, and instead found that differences in state law would make class certification unmanageable.[10]

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[10] In any event, *School Asbestos* is weak authority for the proposition that nationwide class actions may readily proceed under multiple states' laws. The Third Circuit harbored "doubt" about whether plaintiffs could separate the law of the different states into four categories (789 F.2d at 1010), and noted that "'there will be a point at which the sheer magnitude of the task of construing the various laws will compel a court not to certify a multistate class or to reduce it to a more manageable number of states'"

Plaintiffs' reliance on *Georgine* is also misplaced; in fact, that decision reversed a settlement class certification, ruling that individualized choice-of-law issues implicated there would make the "proliferation of disparate factual and legal issues . . . compound[] exponentially." 83 F.3d at 627. There is no conflict with *Georgine*.

Plaintiffs also err in relying on *Prudential,* which reviewed a settlement class certification.[11] The *Prudential* court recognized that "relatively minor differences in state law" may be overcome by subclassing, and ruled that the appellant objectors "ha[d] failed to demonstrate that the differences in applicable state law were sufficient to foreclose a similar approach." 148 F.3d at 315. The Seventh Circuit here found that the state-law differences were not minor, and accepted defendants' argument that the differences would create insuperable difficulties at trial. Thus, as with *School Asbestos* and *Georgine*, *Prudential* creates no conflict with the Seventh Circuit's ruling here.

(*id.* at 1010 n.11 (citation omitted)). But the Third Circuit was "reluctan[t] to vacate" because of "the highly unusual nature of asbestos litigation." *Id.* at 1011. Judge Posner of the Seventh Circuit has since noted that the choice-of-law analysis in *School Asbestos* was essentially *sui generis*, given that "[t]he number of asbestos cases was so great as to exert a well-nigh irresistible pressure to bend the normal rules." *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1304 (7th Cir. 1995).

[11] Notably, the Third Circuit subsequently reversed nationwide class certification of a *litigation* class based in part upon "individual issues" involving, *inter alia*, "state laws" that "would require individual determinations." *In re LifeUSA Holding Inc.*, 242 F.3d 136, 148 (3d Cir. 2001). In doing so, the Third Circuit specifically distinguished *Prudential* on the ground that *Prudential* involved "certification of a *settlement* class action," noting that "[a] settlement class, as distinct from a class action to be tried, does not implicate trial management problems." *Id.* at 146 & n.10 (emphasis in original); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) (distinguishing *Prudential* as settlement certification).

C. The Seventh Circuit's Choice-Of-Law Ruling Is Consistent With The Overwhelming Trend In Contemporary Federal Class-Action Jurisprudence

At bottom, plaintiffs attempt to suggest that the Seventh Circuit is somehow out of step with federal case law involving proposed nationwide class certifications of product- or consumer-based tort and contract claims. Nothing could be further from the truth. Federal courts of appeals have repeatedly rejected proposed nationwide class actions under Rule 23(b)(3). In addition to cases like *Castano*, *Walsh*, and *Georgine*, at least eleven other court of appeals decisions have reversed multistate class certifications or affirmed denials of nationwide class actions, citing choice-of-law concerns.[12] This Court denied *certiorari* in three of those cases—including the petition in *Sikes v. American Telephone & Telegraph Co.*, No. 02-124, just two months ago, which challenged, *inter alia*, the Eleventh Circuit's choice-of-law ruling. *See* 123 S. Ct. 117 (Oct. 7, 2002).

The rationale supporting these court of appeals decisions is consistent and compelling: applying the different laws of multiple state jurisdictions to claims like those at issue here ordinarily makes class treatment unmanageable and is at odds with the superiority requirement of Rule 23(b)(3). A district

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[12] *In re LifeUSA*, 242 F.3d at 147 (reversing nationwide class certification); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1367 n.44 (11th Cir.) (same), *cert. denied sub nom. Sikes v. Am. Tel. & Tel. Co.*, 123 S. Ct. 117 (Oct. 7, 2002); *Stirman v. Exxon Corp.*, 280 F.3d 554, 564-66 (5th Cir. 2002) (same); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001) (same); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir.) (same), *cert. denied*, 122 S. Ct. 348 (2001); *Spence v. Glock*, 227 F.3d 308, 313 & n.8 (5th Cir. 2000) (same); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996) (same); *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (same); *In re Rhone-Poulenc Rorer*, 51 F.3d at 1300 (same). *See also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir. 2001), (affirming denial of nationwide class certification); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 (11th Cir. 1987) (same), *cert. denied*, 485 U.S. 959 (1988).

court would have to apply these different laws at every stage of the proceedings, "complicat[ing] matters exponentially." *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996). Thus, a trial court would have to learn the law relating to multiple claims from as many as 51 different jurisdictions, including all of the nuances of each legal regime, since even "nuance can be important" when interpreting different states' laws. *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1300 (7th Cir. 1995). "While [that] task may not be impossible, its complexity certainly makes individual trials a more attractive alternative and, *ipso facto, renders class certification treatment not superior*." *Castano,* 84 F.3d at 750 (emphasis added).

No fair trial could realistically proceed under such circumstances. Different standards of conduct would apply, "compound[ing] the[ ] disparities" among class members from different states. *Amchem Prods.*, 521 U.S. at 624. And no jury could possibly apply the laws of so many jurisdictions to the different facts of hundreds of thousands of class members. *See, e.g., In re LifeUSA Holding Inc.,* 242 F.3d 136, 148 (3d Cir. 2001) (reversing nationwide litigation class action because, *inter alia*, any attempt to try plaintiffs' claims under varied state laws "would not only be inordinately time consuming and difficult, but it would impermissibly transgress upon the required standards of fairness and efficiency").

The decisions of lower federal courts are consistent with these appellate rulings. Thus, scores of federal district court decisions have denied class certification based in whole or in part upon the fact that the laws of numerous jurisdictions would apply, making class treatment unmanageable.[13] Under

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[13] *See, e.g., In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 67-68, 71 (S.D.N.Y. 2002); *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2002 WL 31028234, at *14 (N.D. Ill. Sept. 10, 2002); *Lewallen v. Medtronic USA, Inc.*, No. C 01-20395 RMW, 2002 WL 31300899, at *5 (N.D. Cal. Aug. 28, 2002); *In re Citigroup, Inc.,* No. CIV.A.

10011912REK, 2001 WL 1682865, at *3 (D. Mass. Dec. 19, 2001); *Hammett v. Am. Bankers Ins. Co.*, 203 F.R.D. 690, 700-02 (S.D. Fla. 2001); *Duncan v. N.W. Airlines, Inc.*, 203 F.R.D. 601, 613-14 (W.D. Wash. 2001); *Neely v. Ethicon, Inc.*, No. 1:00- CV-00569, 2001 WL 1090204, at *8-11, 15 (E.D. Tex. Aug. 15, 2001); *Begley v. Acad. Life Ins. Co.*, 200 F.R.D. 489, 497 (N.D. Ga. 2001); *Oxford v. Williams Cos.*, 137 F. Supp. 2d 756, 764 (E.D. Tex. 2001); *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 307-08 & n.8 (N.D. Ohio 2001); *Stipelcovich v. DirecTV, Inc.*, 129 F. Supp. 2d 989, 995 (E.D. Tex. 2001); *Shelley v. AmSouth Bank*, No. CIV.A.97-1170-RV-C, 2000 WL 1121778, at *8-10 (S.D. Ala. July 24, 2000), *aff'd*, 247 F.3d 250 (11th Cir. 2001); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 219-23 (E.D. Pa. 2000); *Adams v. Kan. City Life Ins. Co.*, 192 F.R.D. 274, 277-78 (W.D. Mo. 2000); *Hallaba v. Worldcom Network Servs. Inc.*, 196 F.R.D. 630, 640, 645 (N.D. Okla. 2000); *Velasquez v. Crown Life Ins. Co.*, MDL-1096 No. CIV.A.M-97-064, 1999 WL 33305652, at *3-*7 (S.D. Tex. Aug. 10, 1999); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 497-98, 503 (S.D. Ill. 1999); *Carpenter v. BMW of N. Am., Inc.*, No. 99-CV-214, 1999 WL 415390, at *4, *8 (E.D. Pa. June 21, 1999); *Chilton Water Auth. v. Shell Oil Co.*, No. CIV.A.98-T-1452-N, 1999 WL 1628000, at *7-*8 (M.D. Ala. May 21, 1999); *Powers v. Gov't Employees Ins. Co.*, 192 F.R.D. 313, 319-20 (S.D. Fla. 1998); *Rothwell v. Chubb Life Ins. Co. of Am.*, 191 F.R.D. 25, 33 n.7 (D.N.H. 1998); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532-34 (N.D. Ill. 1998); *Weikel v. Tower Semiconductor Ltd.*, 183 F.R.D. 377, 402-03 (D.N.J. 1998); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 225 (W.D. Mich. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 465 (D.N.J. 1998); *Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc.*, 181 F.R.D. 331, 339-41 (N.D. Miss. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. at 222-26; *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 368 (N.D. Ill. 1998); *Borskey v. Medtronics*, No. CIV.A.94-2302, 1998 WL 122602, at *3 (E.D. La. Mar. 18, 1998); *Peoples v. Am. Fid. Life Ins. Co.*, 176 F.R.D. 637, 646 (N.D. Fla. 1998); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 370-72, 376 (E.D. La. 1997); *Clement v. Am. Honda Fin. Corp.*, 176 F.R.D. 15, 23 & nn.10-12 (D. Conn. 1997); *Dubose v. First Sec. Sav. Bank*, 183 F.R.D. 583, 587-88 (M.D. Ala. 1997); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 347-52 (D.N.J. 1997); *In re Stucco Litig.*, 175 F.R.D. 210, 215-17 (E.D.N.C. 1997); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 94-96 (W.D. Mo. 1997); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 341-42 (N.D. Ill. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 422-27 (E.D. La. 1997); *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 629-30 (D. Kan. 1996); *Barbarin v. Gen. Motors Corp.*, No. CIV.A.84-0888,

these circumstances, it is unsurprising that one federal district court judge could confidently report that "no federal court has [ever] attempted to try a case under the laws of every state." *Carpenter v. BMW of N. Am., Inc.*, No. 99-CV-214, 1999 WL 415390, at *6 n.11 (E.D. Pa. June 21, 1999) (quotations and citations omitted).

In order to certify a nationwide litigation class here, the district court ignored this consistent precedent, misread Indiana choice-of-law rules, and applied a novel interpretation of Tennessee law to all claims of all consumers nationwide against Firestone. The Seventh Circuit's ruling reversing that erroneous and unprecedented decision was unexceptional, and does not deserve review.

II. PLAINTIFFS' CHALLENGES TO THE SEVENTH CIRCUIT'S SUPERIORITY ANALYSIS ARE BASED UPON DISTORTIONS OF THE SEVENTH CIRCUIT'S DECISION

Plaintiffs' second, third, and fourth questions presented, which challenge supposed aspects of the Seventh Circuit's superiority ruling, are based upon misinterpretations of the Seventh Circuit's decision. None of those questions accurately reflects the decision below, and none warrants review by this Court.

A. The Seventh Circuit Did Not "Usurp" State Law-making Power In Violation Of *Erie v. Tompkins* Or Settled Principles Of Federalism

Plaintiffs contend that the Seventh Circuit decision reversing class certification somehow overruled or overrode state law that would permit recovery by plaintiffs who have suffered actual economic losses. Pet. 19-25. The court did no such thing.

1993 WL 765821, at *3 (D.D.C. Sept. 22, 1993).

Plaintiffs' argument is based upon a contrived reading of the Seventh Circuit decision and a misleading characterization of their claims. To begin with, plaintiffs strive mightily to find an *Erie* issue in the Seventh Circuit's rulings. There is none. The Seventh Circuit ruled on the requirements for application of Rule 23—a federal procedural rule—and in that context assessed the variability of the laws of the 51 jurisdictions at issue.

Second, plaintiffs seek to cast their own allegations as routine economic loss claims, asserting, for example, that no state would deny a breach of warranty claim "because of the absence of physical harm." Pet. 21. But plaintiffs' assertion of such obvious points ignores the novel theory they seek to press—a claim for damages where the product owned by the plaintiff has functioned without incident, but a tiny fraction (fewer than one percent) of products owned by others have failed.

Thus, in the course of analyzing whether Tennessee law could be applied to the propensity-to-fail, no-injury claims of class members around the nation, the Seventh Circuit acknowledged plaintiffs' position that their claims are not based on a product-liability theory. Pet. App. 5a-6a. The Seventh Circuit also recognized plaintiffs' assertions about breach of warranty and fraud, but expressed doubts about the strategy, observing that "most states would not entertain" a theory under which a consumer whose product has performed without incident, and who therefore got substantial uninterrupted use from the product, can nevertheless sue for damages. *Id.* 7a. But the Seventh Circuit's statement was made in the context of evaluating plaintiffs' claims to determine which states' laws would apply and whether those laws varied. *Id.* Thus, in observing the state of "no-injury/no-manifestation" law, the Seventh Circuit did not purport to supplant state law. Nor did it even *predict* state law in a manner that implicates *Erie*. The court did not definitively determine *any* particular state's law relating to plaintiffs'

claims, and it certainly did not purport to overrule or undermine the actions of any state court or legislature in defining the substance of any particular state's laws. It merely cited to existing case law on the issue. Thus, when the actual opinion is examined, plaintiffs' rhetoric about the court having "accreted to itself . . . the power to judge the wisdom of state lawmakers in creating various causes of action" (Pet. 20) rings hollow.[14]

Furthermore, the Seventh Circuit's observation about the state of "no-injury/no-manifestation" law was absolutely correct. The observation was based upon decisions from four federal appellate courts and four state courts.[15] And although

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[14] Plaintiffs take issue with Judge Easterbrook's observations about the economic effects of competing legal rules. *E.g.*, Pet. 20, 23. While Judge Easterbrook's analysis (*see* Pet. App. 6a & n.1) is correct, it is also dictum, and does not rise to something reviewable by this Court. *See California v. Rooney*, 483 U.S. 307, 311-14 (1987) (per curiam); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions.").

[15] Plaintiffs' attempt to distinguish the case law cited by the Seventh Circuit is unavailing. Plaintiffs do not even address two of the cases, *American Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526 (Ct. App. 1995), and *Yu v. IBM Corp.*, 732 N.E.2d 1173 (Ill. App. Ct. 2000). *Cf.* Pet. App. 7a. In *Briehl v. General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999), the Eighth Circuit ruled that "[w]here . . . a product performs satisfactorily and never exhibits an alleged defect, *no* cause of action lies." *Id.* at 628 (emphasis added). Similarly, in *Angus v. Shiley, Inc.*, 989 F.2d 142 (3d Cir. 1993), and in *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094 (5th Cir. 1991), plaintiffs with properly functioning artificial heart valves sought recovery because artificial heart valves implanted in other people had failed. Both courts of appeals refused to recognize such claims. *Angus*, 989 F.2d at 148; *Willett*, 929 F.2d at 1099-1100 & n.20. In *Carlson v. General Motors Corp.*, 883 F.2d 287 (4th Cir. 1989), plaintiffs sought recovery under the implied warranty of merchantability for loss of vehicle resale value due to mechanical failures of GM diesel engines in *other* people's automobiles. The Fourth Circuit called this theory "novel" and affirmed the district court's dismissal of those no-injury claims. *Id.* at 297-98. In *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994), the Supreme Court of Kentucky rejected plaintiffs' no-injury negligence

plaintiffs assert that "it is incontrovertible that states *do* provide such causes of action for purchasers of defective products who have not (or not yet) been physically injured" (Pet. 23), that assertion, like the one quoted above, is off the mark. The question is the variability of a "no-injury" claim; on that, plaintiffs plainly did not persuade the Seventh Circuit, and do not cite any case law in the petition showing that states have uniformly adopted a propensity-to-fail approach like plaintiffs assert here. In fact, they have not.[16]

The Seventh Circuit did, in fact, conclude that the NHTSA process was superior to the district court's nationwide class

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claims and held that "with a substance capable of causing cancer, *just as with any other defective product, no cause of action accrues until the potentially harmful exposure actually 'causes injury that produces loss or damage.'*" *Id.* at 192 (emphasis added) (citation omitted). And in *Ford Motor Co. v. Rice*, 726 So. 2d 626, 631 (Ala. 1998), the Alabama Supreme Court explicitly noted that "courts have generally concluded that claims based upon allegations of inherent product 'defects' that have not caused any tangible injury are not viable." *Id.* at 629. Thus, each of the cases cited by the Seventh Circuit supports the proposition that consumers who bought and received tires that functioned without incident for thousands of miles of actual use have no injury and no viable claim.

Indeed, numerous other cases not cited by the Seventh Circuit support the same basic principle that people whose products function without incident cannot recover on the theory that a small number of products owned by other people have failed. *See, e.g., In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 806 & n.21 (E.D. La. 1998); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99-100 (S.D.N.Y. 1997); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602 (S.D.N.Y. 1982).

[16] Plaintiffs err in relying (Pet. 22) on *Coughlin v. Wellcraft Marine Corp.*, 240 F.3d 449, 452 (5th Cir. 2001). That case did not purport to rule that courts around the nation permit recovery by plaintiffs whose products have performed without incident. Furthermore, *Coughlin* is inapposite: it dealt with someone who thought he had bought a boat made of one material, then found out that it was made of another. 240 F.3d at 451. By contrast, plaintiffs here thought they were purchasing—and did in fact purchase—tires that would function without incident for thousands of miles.

action, which was based upon announcing new law (by finding that Tennessee and Michigan would permit "no-injury/no-manifestation" claims to proceed), declaring that law to control all of the claims of consumers throughout the land, and then applying that law to facts that varied materially from purchaser to purchaser.[17] In doing so, the Seventh Circuit aligned itself with numerous other courts that have found the NHTSA process to be superior to sprawling and unmanageable class actions by those whose products have performed without incident. *See, e.g., Chin v. Chrysler Corp.*, 182 F.R.D. 448, 464 (D.N.J. 1998) ("the administrative remedy provided by NHTSA . . . is more appropriate than civil litigation seeking equitable relief and money damages in a federal court"); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 353 (D.N.J. 1997) (same).[18]

Finally, plaintiffs' assertion of some sort of conflict between the Seventh Circuit's ruling and *Hanlon* or *School Asbestos* on this issue (Pet. 24) is frivolous. Neither *Hanlon* nor *School Asbestos* addressed whether the NHTSA process is superior to a nationwide class action lawsuit by those whose products have performed without incident, and whose claims would therefore be subject to dismissal under many, if not all, states' laws.

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[17] Neither Tennessee nor Michigan case law authorized plaintiffs to proceed with warranty-based claims, unjust enrichment claims, or consumer fraud claims when the product at issue had performed without incident. No Tennessee or Michigan court had recognized plaintiffs' novel, propensity-to-fail theory of product defect. And plaintiffs had not cited a single federal nationwide litigation class action of no-injury product defect claims that would serve as a model for litigation.

[18] *Accord, e.g., Feinstein*, 535 F. Supp. at 607 n.18; *Frank v. Daimler/Chrysler Corp.*, 741 N.Y.S.2d 9, 17 (App. Div. 2002); *Ford Motor Co. v. Magill*, 698 So. 2d 1244, 1245 (Fla. Dist. Ct. App. 1997); *Am. Suzuki Motor Corp.*, 44 Cal. Rptr. 2d at 531-32.

B. The Seventh Circuit's Treatment Of Plaintiffs' Allegedly "Negative-Value" Claims Does Not Conflict With The Law Of This Court Or Any Circuit

Plaintiffs also err in suggesting that the Seventh Circuit held that small-value claims weighed against class certification. Pet. 25-29. Again, the Seventh Circuit did nothing of the sort.

At the threshold, plaintiffs' claims are not "negative-value" claims. Attorneys' fees provisions in most consumer fraud statutes provide ample incentive to ensure that, if a claim has merit, it will be pursued. *See, e.g., Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 456 (E.D. Pa. 2000) (ability to recover attorneys' fees belies the projected problems of a negative value suit); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 375 (E.D. La. 1997) (same).

The Seventh Circuit, however, did not address whether plaintiffs' claims were large- or small-value. It did not take the *small* value of plaintiffs' claims "as a basis for finding that a class action would *not* be superior . . . ." Pet. 26 (emphasis in original). Rather, the court recognized that the *novel* and *speculative* nature of plaintiffs' claims—the fact that purchasers' products "have so far performed properly," and whose owners seek compensation based only on "the *risk* of failure, which may be reflected in diminished resale value . . . and perhaps mental stress" (Pet. App. 2a) (emphasis in original)—made class certification inferior to alternatives. In deciding that plaintiffs' claims could proceed, the district court had broken new ground. The district court had no precedent—from Tennessee, Michigan, or otherwise—showing how a class action asserting such novel claims could be tried. The district court was thus essentially flying blind, and any assessment of manageability or superiority was pure speculation.

As a result, the Seventh Circuit properly found that a class action would not satisfy the superiority requirement of Rule 23(b)(3). That ruling is consistent with other courts that have addressed the issue. "In the context of an immature" legal theory, "any savings in judicial resources is speculative." *Castano*, 84 F.3d at 749; *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997) (finding plaintiffs' theory that siding is "prone to fail . . . runs into *Castano*'s admonition not to certify novel tort classes"); *see also, e.g., Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 494-95 (E.D. Pa. 1997).

In any event, the supposed "negative value" of plaintiffs' claims does not change the analysis under Rule 23(b)(3). The rule does not distinguish between litigation involving large and small claims, and courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted . . . ." *Amchem*, 521 U.S. at 622. None of the cases cited by the plaintiffs (Pet. 25-27) held that either Rule 23 standards or appellate scrutiny of any particular consumer class action should be any less demanding because of the type or size of the claims. And "the negative value of [a] case cannot justify the headlong plunge into an unmanageable and interminable litigation process . . . ." *Barreras Ruiz v. Am. Tobacco Co.*, 180 F.R.D. 194, 199 (D.P.R. 1998); *Masonite*, 170 F.R.D. at 426-27 ("the magnitude or kind of injury does not make these claims, by virtue of their character, any the more suitable for class management"). Thus, the courts of appeals have not hesitated to reverse class certifications of supposed "negative-value" claims. *See, e.g., Spence v. Glock*, 227 F.3d 308, 314-16 (5th Cir. 2000) (reversing class certification of numerous small-value common-law claims); *Andrews*, 95 F.3d at 1023-25 (reversing class certification of small-value RICO claims); *In re LifeUSA*, 242 F.3d at 148 n.13 (rejecting "relatively modest" common-law claims, noting that size of claims is "insufficient to overcome the hurdles of predominance and superiority").

C. The Seventh Circuit's Assessment Of The District Court's Misguided View Of Litigation "Efficiency" Does Not Conflict With The Law Of Any Other Court

Plaintiffs further err in suggesting that the Seventh Circuit interpreted the word "efficient" in Rule 23(b)(3) in a manner that conflicts with the law of other courts. Pet. 27-30. Again, that argument rests on a fundamental misreading of the Seventh Circuit's opinion.

The Seventh Circuit recognized that the district court's proposed class action was a litigation nightmare, in which novel theories would have to be assessed under a variety of different legal standards and then applied to countless individualized factual circumstances. The district court was determined to proceed despite these problems. Pet. App. 11a-13a. This approach, according to the Seventh Circuit, valued "central planning" over the ordered development of the law by those entities primarily charged with deciding the law of the states—namely, the states themselves. *Id.* According to the Seventh Circuit, "[d]ifferences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *Id.* 12a (citing *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 568-73 (1996)). That view is unassailable, and does not conflict with the law of this Court or any other jurisdiction. None of the cases cited by the plaintiffs (Pet. 27-30) hold, or even suggest, that a court can override substantive law or ignore issues of fairness in an attempt to achieve "efficiency."

Indeed, plaintiffs' arguments ignore the text of Rule 23, which requires that class certification be superior to other mechanisms for the "*fair and* efficient" resolution of the controversy. Rule 23(b)(3) (emphasis added). Just as the district court had done, plaintiffs focus entirely on speed, costs, and available resources. The Seventh Circuit's analysis

confirms, as it should, that speed and cost savings alone cannot justify class certification. Fairness is critical. That analysis is consistent with decisions of this Court and other federal courts of appeal. *See Amchem Prods.*, 521 U.S. at 615; *Zinser*, 253 F.3d at 1192; *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-44 (4th Cir. 1998); *In re Am. Med. Sys.*, 75 F.3d at 1085.

III. THE SEVENTH CIRCUIT'S RULING THAT INDIVIDUAL FACTUAL ISSUES PREDOMINATE PROVIDES FURTHER GROUNDS FOR DENYING REVIEW

In addition to its choice-of-law and superiority rulings, the Seventh Circuit held that individualized factual issues predominate, preventing certification of even a statewide class action. Pet. App. 9a-11a. This additional holding makes this case unsuitable for *certiorari* review, since the nationwide class proposed by the plaintiffs cannot proceed in any event.

The district court held, and plaintiffs conceded, that all of their claims depend upon showing that all of the tires in the Tire Class are defective. Pet. 5. Proving defect would require examining how the tires were designed, how they were used, and how they performed over time. The record before the district court and the Seventh Circuit demonstrated that the millions of tires in the Tire Class differed in design, use, and performance—confounding any classwide proof of defect.

The proposed Tire Class put at issue 60 million tires, manufactured over more than ten years. Plaintiffs' own submission to the district court illustrated that the multiple different tires in the Tire Class were manufactured to scores of different design specifications. Unrefuted evidence showed that those specifications created tires with different sizes, different vehicle applications (*i.e.*, SUVs versus pick-up trucks), and different performance characteristics.

The NHTSA investigation underscored that tires in the Tire Class differed materially in design. NHTSA investigated these tires for eighteen months. Firestone recalled 14 million of the 60 million investigated tires in August 2000. Upon completion of its investigation, NHTSA determined that only about 3.5 million additional tires should be replaced, and Firestone promptly complied. NHTSA did not think the rest of the tires—more than 40 million—required recall.

Furthermore, even if all the tires had been identical, the evidence established that individual issues still would predominate. The circumstances of each class member's purchase and use of the tires are unique. As but one example, tire purchasers used their tires for differing periods of time and differing mileage, with many or most receiving full usage for the expected lifetime of their tires. Evidence of actual use would be relevant to issues such as the existence (or absence) of a defect, merchantability, and the existence (if any) of an injury.

Against this backdrop, the Seventh Circuit properly recognized that the district court had abused its discretion by ignoring record evidence showing that there was no factual predominance. Pet. App. 9a-11a. The Seventh Circuit noted the legal significance of only a limited number of the tires being recalled (*id.* 10a), the fact that most tires were not designed for Explorers (*id.*), and the different design specifications put at issue (*id.*). The district court had not even attempted to reconcile its predominance ruling with those facts—let alone the rest of the record. Nor had the district court explained how the claims relating to the 60 million different tires could be fairly or manageably tried in a single, all-or-nothing trial.

For these reasons, the Seventh Circuit properly found that class certification—even on a statewide basis—was impossible. *Id.* 9a. This renders the questions presented in the petition ultimately superfluous: wholly apart from the Seventh

Circuit's manageability and superiority rulings, this case could not proceed as a class action because individual issues of fact predominate. Thus, if this Court were inclined to review questions like those presented in plaintiffs' petition, it should await a more appropriate case for doing so.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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